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IN THE

Supreme Court of the United States

CASE No. [redacted] 72

1964

CITY OF PLANTATION, a municipal corporation of Broward County, Florida,

Appellant,

vs.

UTILITIES OPERATING CO., INC., a Florida corporation,

Appellee.

JURISDICTIONAL STATEMENT

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IN THE

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CASE No. _____

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Appellee.

JURISDICTIONAL STATEMENT

INTRODUCTION

This is an appeal from an opinion and judgment of the Supreme Court of Florida. *City of Plantation v. Utilities Operating Co., Inc.*, Fla. 1963, 156 So.2d 842. The opinion is appended hereto (App. 4-6), and was an affirmance of the trial court's declaratory decree sustaining the validity of Chapter 367 of the Florida Statutes (App. 1-3). The appellant here was the plaintiff in the trial court and the appellant in the highest State court. The appellee here was the defendant and appellee, respectively.

JURISDICTION OF THIS COURT

The action was commenced by plaintiff's suit for a declaratory decree, pursuant to §87.01, et seq., of the Florida Statutes. Plaintiff sought thereby, inter alia, a declaration of the constitutional infirmities of Chapter 367 of the Florida Statutes. The Chancellor rejected the assault upon the statute(s), and his decree was affirmed by the Supreme Court of Florida (citation, supra) in an opinion and judgment filed on July 31, 1963 (Tr. 163). Rehearing was denied on October 22, 1963 (Tr. 167), and the notice of appeal was filed in the State supreme court on January 20, 1964 (Tr. 168).[1]

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. §1257 (2), 28 U.S.C.A. §1257 (2).[2] *Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942); *American Toll Bridge Co. v. Railroad Commission of California*, 307 U.S. 486, 59 S.Ct. 948, 83 L.Ed. 1414 (1939).

STATE STATUTE INVOLVED

The validity of Chapter 367 of the Florida Statutes (Laws of Florida, 1959, Chapter 59-372) is involved. It appears in full in the Appendix (App. 7-35), and may be found in Volume 1, Florida Statutes, 1959, pp. 1547-1555.

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[1] Copies of orders entered by the Florida Supreme Court, extending the time for docketing the appeal, are transmitted with the transcript of record, in separate folio.

[2] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity. * * * "

QUESTION INVOLVED

Whether Florida's highest court erroneously held that the Water and Sewer System Regulatory Law was a proper exercise of the State's police power, and therefore did not unconstitutionally impair the rate-making power reserved by the City/grantor in its pre-existing franchise agreement with the Utility Company/grantee.

STATEMENT OF THE CASE

The appellant/city's amended complaint for declaratory decree alleged that the plaintiff had become a municipal corporation in 1953.[1] In 1954, the plaintiff, in an effort to provide itself and its citizens with water and sewerage service "at reasonable rates", entered into a 30-year franchise agreement with the defendant/utility company, whereby the latter was granted the right to construct, maintain and operate water and sewerage plants and systems within the city's boundaries (Tr. 22, 28-38). The agreement (consisting of Ordinance No. 27 and amendments thereto; Tr. 28-47) set maximum initial rates for water and sewer service, and reserved for the City the right to determine the reasonableness of future rates (Tr. 29, 33, 46).

The complaint went on to allege that, some five years after the franchise agreement, the Florida Legislature enacted Chapter 367 of the Florida Statutes (Water and Sewer System Regulatory Law) and that, pursuant to such law, the defendant had increased its water and sewerage service rates, and applied to the State utilities commission for approval of the new charges (Tr. 22-26,

[1]By virtue of Laws of Florida, Special Acts, 1953, Chapter 29446.

48-63). The complaint further alleged that the Water and Sewer System Regulatory Law, if applicable to the franchise agreement, constituted "an impairment of the contractual relationship between the plaintiff and the defendant" (Tr. 24).

The defendant filed an answer and an amended and supplemental answer (Tr. 73-76, 81-84). These responsive pleadings admitted the franchise agreement, and defendant's subsequent construction and operation of the water and sewerage systems contemplated (Tr. 73). Defendant alleged, however, that the franchise agreement was subject to the challenged statute, and was superseded thereby (Tr. 73-74). The defendant admitted that, pursuant to Chapter 367, it had increased its rates, and had applied to the State utilities commission for approval of the increases (Tr. 74-75). It denied that the new law impaired the franchise agreement. Alternatively, the defendant claimed that if such impairment did result, the Florida Legislature had "the constitutional authority to enact statutes having said effect" (Tr. 82).

The cause eventually came to a hearing on the merits (Tr. 111). The franchise agreement and the defendant's application for increased rates, filed with the Florida Railroad & Public Utilities Commission, were undisputed (Tr. 28-47, 91A-103, 113-114, 121-130). An intervening rate increase, granted by the City, also was in evidence (Tr. 89-91).

Eventually, the trial court entered its declaratory decree, holding, inter alia, that the challenged statute did not constitute an "unconstitutional impairment of the contractual relationship between the plaintiff and the de-

fendant", and was not "violative of the Constitution * * * of the United States" (App. 1-3).

The plaintiff took an appeal from the final decree, supra, to the Supreme Court of Florida (Tr. 110). Among the errors assigned on appeal was the trial court's decision that the Water and Sewer System Regulatory Law did not unconstitutionally impair the franchise agreement, and did not violate the Federal Constitution (Tr. 157, 158). The appeal culminated in the opinion and judgment of affirmance now sought to be reviewed. Therein, the Court held that the statute was not repugnant to Article 1, Section 10, of the United States Constitution (App. 5-6).[4]

Specifically, the Florida Court held (App. 5-6):

* * *

"If the agreement between the parties were a private arrangement between individuals that did not involve a restriction upon the State's police power, the contentions of the appellant would be sound. There is no doubt that by conveying to the state Utilities Commission the power to regulate rates, the Legislature preempted the pre-existing authority which the City had reserved by the franchise agreement. Nevertheless, the constitutional rule against impairment does not apply to a contract of the nature now under consideration. This is so because a municipality cannot foreclose the exercise of the

[4] "No State shall * * * pass any * * * law impairing the obligation of contracts * * * ."

State's police power by such an arrangement. * * * "

SUBSTANTIAL FEDERAL QUESTION PRESENTED

Clearly, the Florida Supreme Court held, supra, that the appellant's contractual right to set public utility rates was subject to divestment at the whim of the state legislature; and such police power, when asserted, was not repugnant to the contract clause of the Federal Constitution. Thus, the Florida Court overlooked, or chose to ignore, an exception to the rule of legislative rate-making supremacy. As stated in 16 C.J.S., Constitutional Law, §327, pp. 1367-68:

> "An exception, however, exists to the rule that the state may change public service rates or charges fixed by contract, for, although the state may not entirely abandon the highly important governmental function of regulating such rates, nevertheless it may temporarily suspend the exercise of the power, and may vest in one of its municipalities or agencies the authority to enter into an inviolable contract for a reasonable period as to the rates to be charged by a public utility for its service, which contract will be protected against impairment by the state; so that where a municipality at the time of granting a franchise is vested with full and clearly conferred authority to contract with the grantee on the subject of fixing rates which may be charged for services rendered under the franchise, the rates fixed in the franchise contract are irrevocable, under the constitutional provision against im-

> pairment of contracts, during the franchise period without the consent of the municipality * * * ."

Did the appellant have full and clearly-conferred authority, in 1954 (the franchise year), to regulate the water and sewerage service rates of the enfranchised utility company? An affirmative answer is supplied by the Florida Statutes. The State Legislature created the appellant by granting it a Charter in 1953. By the Charter, the appellant was expressly authorized to grant franchises to water and sewerage companies,[5] and had the corollary power "to establish, impose and enforce water rates, and rates and charges for * * * sewerage service" furnished to the City and its inhabitants by the utility.[6] Cumulatively, at the time of the franchise, §§167.21, 167.22 of the Florida Statutes permitted the City to grant utility company franchises for a term not exceeding thirty years;[7] and, by §167.57, the Florida Legislature directed that the appellant/city

> "* * * may prescribe by ordinance maximum rates and charges for the supply of water furnished (by and enfranchised water company) to such city, town or village and the inhabitants thereof, such charges to be just and reasonable * * * ."

This Court held that the quoted delegation of rate-making authority was "a natural method of preventing excessive

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[5]Laws of Florida, Special Acts, 1953, Chapter 29446, p. 2559.
[6]Id., pp. 2552-53.
[7]The instant agreement was so limited (Tr. 28).

charges". *Tampa Waterworks Co. v. Tampa*, 199 U.S. 241, 244, 26 S.Ct. 23, 24, 50 L.Ed. 170, 173 (1905).

By the foregoing provisions of Florida's statutory law, the appellant had clearly-conferred authority to enter into the thirty-year franchise agreement, and thereby reserve to itself the power to determine and set reasonable rates. Under such circumstances, this Court has held:[1]

> "It has long been settled that a State may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and that *the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates.* Home Telephone Co. v. Los Angeles, 211 U.S. 265, 273, 29 S.Ct. 50, 53 L.Ed. 176, and cases there cited. * * * " (Emphasis supplied)

Thus, once the State has, for a reasonable time, surrendered its rate-making authority to a municipality, it is thereafter prevented by the contract clause of the Constitution from impairing the enfranchised public utility rate. *Detroit United Railway v. Michigan*, 242 U.S. 238, 37 S.Ct. 87, 61 L.Ed. 268 (1916); *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432, 43 S.Ct. 613, 67 L.Ed 1065 (1923); *Los Angeles v. Los Angeles City Water Co.*, 177 U.S. 558, 575, 20 S.Ct. 736, 742, 44 L.Ed. 886, 894 (1900).

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[1] St. Cloud Public Service Co. v. St. Cloud, 265 U.S. 352, 355, 44 S.Ct. 492, 493, 68 L.Ed. 1050, 1054 (1924). To the same effect, see, Annotation, 74 L.Ed. 234-348; Railroad Commission of California v. Los Angeles Ry. Corp., 280 U.S. 145, 151, 50 S.Ct. 71, 72, 74 L.Ed. 234, 307-9 (1929).

Indeed, even if the Florida Supreme Court correctly held that the legislature retained a reservoir of authority over public utility rates, the Water and Sewer System Regulatory Law was not a proper exercise of that supposedly reserved police power. Any such exercise of the police power must be for a purpose which is in fact public, and the means adopted to that end must not be arbitrary or unreasonable. *State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 108-9, 58 S.Ct. 443, 450, 82 L.Ed. 685, 695 (1938); *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 197, 56 S.Ct. 408, 411, 80 L.Ed. 575, 580-81 (1936).

The ostensibly salutary Water and Sewer System Regulatory Law was, by its own terms, not one of statewide operation.[8] The law became effective in any county of the State *only upon approval of the governing body of the county* (§367.23; App. 35). By some strange anomaly, therefore, the legislature did not *assert its extraordinary police power*, but, instead, made it a matter of local option. Nor, for that matter, would the act necessarily apply to every city in a county that adopted its provisions! Section 367.22 of the act *expressly saved cities of more than 100,000 population from impairment of its existing franchises* (App. 35). Unfortunately, the appellant was located in one of the few counties that adopted the law, and its population has never approached 100,000 people.[9] As a consequence, although the challenged statute is purportedly "for the protection of the public welfare", Ibid., the appellant and its inhabitants have thereby become the arbitrary statutory beneficiaries of substantially higher rates for water and sewerage service. *Utilities Operating Co. v. King*, Fla.1962, 143 So.2d 854.

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[9]See THE U.S. CENSUS OF POPULATION: 1960 Final Report, §11A, p. 16.

CONCLUSION

The Florida Supreme Court erroneously held that, although Chapter 367 of the Florida Statutes impaired appellant's franchise agreement, such legislation was a proper exercise of the State's police power, and therefore not repugnant to Article 1, Section 10, of the United States Constitution. That the resulting judgment must be reversed, is

Respectfully submitted,

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CASE No. _____

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vs,

UTILITIES OPERATING CO., INC., a Florida corporation,

Appellee.

APPELLANT'S APPENDIX

JUDGMENT OF THE TRIAL COURT

(Transcript, pp. 108-109)

(Formal parts omitted)

• • • •

This cause coming on to be heard on final hearing, and the Court having heard testimony of the parties hereto and having heard argument of counsel and being otherwise sufficiently advised, it is

ORDERED, ADJUDGED AND DECREED as follows:

1. This Court has jurisdiction of the parties hereto and of the subject matter hereof.

2. The equities of this cause are with the defendant, UTILITIES OPERATING CO., INC.

3. The following are the rights of the parties with regard to which the plaintiff alleged it was in doubt:

(a) Chapter 59-372 of the General Acts of the State of Florida, known as the "Water and Sewer System Regulatory Law," is applicable to the defendant, UTILITIES OPERATING CO., INC. by virtue of the fact that the Board of County Commissioners of Broward County, Florida, has duly adopted a resolution declaring that Broward County, Florida, is subject to the provisions of said law.

(b) Said law does not constitute any unconstitutional impairment of the contractual relationship between the plaintiff and the defendant.

(c) The contention made by the plaintiff that said statute denies due process of law is moot as a result of changes in the said law enacted by the 1961 Legislature.

(d) The Court is of the opinion that the plaintiff has failed to establish that the said Act in question, as amended, is violative of the Constitution of the State of Florida or of the United States of America.

(d) Plaintiff's complaint against the defendant charging that the defendant's procedure before the

Florida Railroad and Public Utilities Commission was improper, has not been established. In addition, the Court is of the opinion that any complaints as to procedural defects should have been raised in the administrative proceedings and are not the proper subject for complaint in this cause.

4. The Court is, therefore, of the opinion that the defendant should prevail. Plaintiff's amended complaint for a declaratory decree, supplemental and additional relief, is, therefore, hereby dismissed with prejudice at the cost of the plaintiff.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this September 19th, 1962.

/s/ JAMES H. WALDEN
Circuit Judge

OPINION AND JUDGMENT OF THE SUPREME COURT OF FLORIDA

(Transcript, pp. 163-166)

(Formal parts omitted)

* * * *

By direct appeal we have for review a final decree of a circuit court sustaining the validity of Chapter 367, Florida Statutes, against an assault upon its constitutionality.

We must decide whether Chapter 367 impairs the obligation of a pre-existing franchise agreement between the appellant City and the appellee Utility.

By its complaint the City of Plantation sought declaratory relief in the circuit court. The complaint alleged that in 1954 the City and the appellee Utility Company entered into a thirty-year franchise agreement. By the contract the Utility agreed to construct and operate water and sewage systems within the City boundaries. The agreement provided for reasonable rates and saved to the City the authority to determine such reasonableness. Five years later the Florida Legislature enacted Chapter 59-372, Laws of 1959, known as the "Water and Sewer System Regulatory Law." This is now Chapter 367, Florida Statutes. The cited statute authorizes the Florida Railroad and Public Utilities Commission to regulate the rates charged by water and sewer companies, in those counties which are placed under the law by resolution of the Board of County Commissioners. It is admitted that Broward County, in which the City of Plantation is located, has been brought within the scope of the statute. In its declaratory decree proceeding the City contended that the statute impairs the obligation of the pre-existing contract

between the municipality and the Utility. This is so, claims the City, because by the contract the City reserved the power to regulate the water and sewer rates. The subsequent statute conveys this rate regulatory authority to the Florida Railroad and Public Utilities Commission, thereby nullifying the power formerly enjoyed by the City. The circuit judge was of the view that the statute did not do violence to State and Federal constitutional provisions which preserve the sanctity of contracts against legislative impairment. The final decree to this effect is now submitted for review.

The appellant, by its brief, points to the terms of the franchise agreement regarding its reservation of authority to regulate rates. It then argues that the provisions of the State and Federal Constitutions which prohibit the passing of laws impairing the obligation of a contract, protect the franchise agreement against the rate regulatory provisions of Chapter 367, Florida Statutes. Article I, Section 10, Constitution of the United States; Section 17, Declaration of Rights, Florida Constitution.

If the agreement between the parties were a private arrangement between individuals that did not involve a restriction upon the state's police power, the contentions of the appellant would be sound. There is no doubt that by conveying to the state Utilities Commission the power to regulate rates, the Legislature pre-empted the pre-existing authority which the City had reserved by the franchise agreement. Nevertheless, the constitutional rule against impairment does not apply to a contract of the nature now under consideration. This is so because a municipality cannot foreclose the exercise of the State's police power by such an arrangement. Puget Sound Trac-

tion Light & Power Co. v. Reynolds, 244 U.S. 574, 61 L.Ed.1825.

Article XVI, Section 30, Florida Constitution, vests in the Legislature full power to regulate charges and services performed by public utilities. Until the Legislature undertakes to assert this power, a franchise arrangement, such as the one before us, may properly provide for rate regulation by a municipality. Such an agreement, however, is presumed to have been made with full knowledge of the inherent reserved power of the State to alter the contract regarding rates at such time as the Legislature deems it appropriate to assert the power under the Constitution. It also follows that when the parties enter into such a contract they do so with the full realization that the contractual provisions are ineffective to preclude subsequent legislative action in the exercise of the State's police power. We have said that "the right to exercise the police power is a continuing one." Miami Beach Co. v. Railroad Commission, 20 So. 2d 856; Florida Power Corp. v. Pinellas Utility Board, 40 So. 2d 350, and on rehearing, 40 So. 2d 844. This continuing power cannot be interrupted or intercepted by the execution of a contract such as the one which we now consider. 12 Am. Jur. Constitutional Law, Section 412 and Section 421; Mobile v. Mobile Electric Co., 203 Ala. 574, 84 So. 816.

We have disposed of the only point for reversal presented by the appellant's brief. The points assigned as error but not discussed are deemed waived. Rule 3.7(i), Florida Appellate Rules.

The decree of the chancellor is affirmed.

It is so ordered.

• • •

CHAPTER 367

1959 FLORIDA STATUTES

367.01 **Short title.** This law shall be known and may be cited as the "water and sewer system regulatory law."

367.02 **Definition.** As used in this law the following words and terms shall have the following meanings:

(1) "Commission" shall mean and be limited to the Florida railroad and public utilities commission.

(2) "Governmental agency" shall mean a county, a public authority created by an act of the legislature of this state, an incorporated city, town or village in this state, or any taxing district created by such county, public authority, incorporated city, town or village.

(3) "Territory" shall mean any area in this state, whether within or without the corporate limits of any municipality.

(4) "Water system" shall mean and include any real estate, attachments, fixtures, impounded water, water mains, laterals, valves, meters, plant, wells, pipes, tanks, reservoirs, systems, facility, or other property real or personal, used or useful or having the present capacity for future use in connection with the obtaining, treatment, supplying and distribution of water to the public for human consumption, fire protection, irrigation, consumption by business or industry, and without limiting the generality of the foregoing definition shall embrace all necessary appurtenances and equipment and shall include

all property, rights, easements and franchises relating to any such system and deemed necessary or convenient for the operation thereof, but shall not include property used solely for or principally in connection with the business of bottling, selling, distributing or furnishing bottled water, nor water systems utilized by manufacturing plants primarily for the purpose of providing water in connection with its manufacturing operations.

(5) "Sewer system" shall mean and include any plant, system, facility or property used or useful or having the present capacity for future use in connection with the collection, treatment, purification or disposal of sewage and sewage effluent and residue for the public, and without limiting the generality of the foregoing definition shall embrace treatment plants, pumping stations, intercepting sewers, pressure lines, mains, laterals, and all necessary appurtenances and equipment and shall include all property, rights, easements and franchises relating to any such system and deemed necessary or convenient for the operation thereof; except municipally owned or operated sewer systems and systems for the collection, treatment, purification or disposal of industrial wastes for manufacturing plants owned or operated by such manufacturing plants.

(6) "Person" shall mean and include:

(a) Any natural person, firm, association, corporation, except municipal corporations, business, trust or partnership owning, leasing or operating any water system or sewer system or part thereof within this state; and

(b) Any cooperative, nonprofit corporation or association, membership corporation, or limited dividend or mutual association, now or hereafter created, with respect to that part or portion of its operations devoted to the ownership, leasing or operations devoted to the ownership, leasing or operation of a water system or a sewer system within this state but shall not include the owners or operators of any industrial or manufacturing plants maintaining and operating water systems and sewer systems primarily in connection with its manufacturing operations.

(7) "Public utility" shall mean and include every person and every lessee, trustee or receiver now or hereafter owning, leasing, constructing, operating, or managing any water system or sewer system, or both, in this state, serving or proposing to serve four hundred or more connections for compensation paid or received directly or indirectly, but shall not mean or include any person selling, distributing or furnishing bottled water and not otherwise engaged directly or indirectly in owning, leasing, constructing, operating or managing any water system or sewer system nor any utility owned or operated by a governmental agency; nor the owner or operator of any manufacturing or industrial plant owning or operating water or sewer systems primarily in connection with its manufacturing or industrial operations, provided however, any person and any lessee, trustee or receiver now or hereafter owning, leasing, constructing, operating, or managing any water system or sewer system or both, in this state, serving or proposing to serve less than four hundred connections for compensation paid or received directly or indirectly shall upon application to the commission be classified as a public utility under the provi-

sion of this law; failure to so apply for such classification within the period of six months from June 18, 1959, shall constitute a bar to participation under this law and shall cause such person and every lessee, trustee or receiver now or hereafter owning, leasing, constructing, operating, or managing any water system or sewer system or both, in this state, serving or proposing to serve less than four hundred connections for compensation paid or received directly or indirectly to come within the jurisdiction of any county, municipal or other properly constituted governmental agency for the purpose of regulation and control.

(8) "Certificate" shall mean and be limited to a certificate of public convenience and necessity issued under this law.

367.03 **Registration of public utilities; notice to registrants.** Every public utility excluding utilities owned or operated by governmental agencies engaged on June 18, 1959, in operating, constructing or extending any water system or sewer system shall register with the commission within sixty days after June 18, 1959, by filing with the commission a written statement setting forth the full legal name of the public utility, its principal place of business and its mailing address. The commission shall give by mail to every public utility so registering and to every recipient of a certificate issued under this law at least ten days written notice of every public hearing required by this law.

367.04 **Certificates required for new systems.** From and after June 18, 1959, no public utility shall commence the construction or operation of a water system or sewer

system without first obtaining from the commission a certificate of public convenience and necessity pursuant to the provisions of this law; provided, however, that this section shall not apply to any governmental agency; and provided further that no application for a certificate to operate within the corporate limits of a municipality of one hundred thousand or more population according to the last official census shall be entertained until the applicant shall have first obtained a franchise from the municipality subject to such reasonable terms and conditions as the municipality may require; and provided further that no application for a certificate to operate within the unincorporated area of any county of this state shall be entertained until the applicant shall have first obtained a franchise from the board of county commissioners of such county subject to such reasonable terms and conditions as the board of county commissioners may require.

367.05 **Procedure for obtaining certificates for new systems.**

(1) APPLICATION. — All applications for certificates required by §367.04 shall be filed with the commission in compliance with such rules and regulations and in such form as the commission may from time to time adopt or prescribe. Each such application shall be accompanied by a filing fee of two hundred fifty dollars to be placed in the general revenue fund.

(2) NOTICE. — Upon the filing of an application complying with the rules and regulations of the commission and payment of the filing fee, the commission shall cause the application to be set for public hearing. At

least ten days written notice of such public hearing shall be given by mail to the chief executive officer of every county and municipality affected which has notified the commission that they want to receive notice and to the Florida state board of health, and notice of such public hearing shall be published once a week for three consecutive weeks in a newspaper of general circulation in the territory affected.

(3) PUBLIC HEARING. — Pursuant to such notice the commission shall conduct a public hearing in the county or counties where the public utility is operating to determine whether public convenience and necessity require or will require such construction or operation, taking into consideration among such other matters as it may deem appropriate the questions whether the issuance of such certificate will be in the public interest, health and welfare, and whether the applicant can reasonably be expected to provide adequate service at reasonable rates.

(4) ACTION BY COMMISSION. — After such public hearing the commission shall make its determination of public convenience and necessity. In so doing it shall state its reasons therefor and make findings of the subsidiary facts on which the determination is predicated. In accordance with and based on the determination the commission shall issue a certificate or deny the application.

(5) TIME LIMIT ON CERTIFICATE. — The commission may prescribe in the certificate a reasonable time within which the authority granted thereby shall be exercised. If the service authorized by the certificate is not provided within the time so prescribed, the certificate shall thereby be canceled and rendered null and void; provided,

however, that prior to the expiration of the time prescribed in the certificate the commission shall have power for good cause shown to extend such time and to impose such conditions as shall assure the provision of adequate service at reasonable rates.

(6) CERTIFICATE FOR COMPETING SYSTEM. — The commission shall not grant a certificate for the construction, operation or extension of a water system or sewer system in or into any territory served by any public utility or municipality or in or into any territory defined in a certificate issued to a public utility or which otherwise would compete with any other water system or sewer system unless the commission shall first determine, after public notice and public hearing, that the existing facilities are inadequate to meet the reasonable needs of the public and that the public utility owning or operating the existing facilities has refused or is and will continue to be unable to meet the reasonable needs of the public. In the event of any such determination being made the commission shall, to the extent required by the determination but only to that extent, revoke, amend, limit or restrict any certificate previously issued. Any such determination shall embody a statement by the commission of its reasons therefor and findings by the commission of the subsidiary facts on which the determination is predicated.

367.06 **Certificates for existing systems.**

(1) PUBLIC UTILITIES. — Every public utility, or any person, firm, or corporation holding a valid and existing franchise granted by the board of county commissioners of any county of this state in a given county, whether construction has started or not, excluding utili-

ties owned or operated by the governmental agencies engaged on June 18, 1959, in the construction or operation of a water system or sewer system shall be entitled to receive from the commission a certificate of public convenience and necessity authorizing such public utility to continue serving the territory it serves on June 18, 1959, if, within one hundred and twenty days after June 18, 1959, application for such certificate shall be made in compliance with such rules and regulations and in such form as the commission shall have adopted and prescribed. Each such application shall be accompanied by a filing fee of $100 to be placed in the general revenue fund.

(2) EXTENSION OF TIME. — If within sixty days after June 18, 1959, the commission shall not have adopted and prescribed rules and regulations for the filing of and the form in which applications authorized by this section shall be filed, the time for the filing thereof shall be extended for a period of sixty days after such rules, regulations and form shall have been adopted and prescribed.

(3) PROCEDURE FOR ISSUING CERTIFICATES. — If the commission shall determine that the territory professed to be served by any applicant for a certificate under this section does not conflict with, overlap or infringe upon any portion of the territory professed to be served by any other applicant and that all requirements of this section have been complied with, the commission shall issue to the applicant a certificate of public convenience and necessity authorizing it to continue serving such territory.

(4) CONFLICTS. — If the territory professed to be

served by any applicant for a permit under this section conflicts with, overlaps or infringes upon any portion of the territory professed to be served by another applicant, the commission, after public notice and public hearing, shall resolve such conflict, overlapping or infringement by a determination establishing and fixing such boundary line or lines between or among the professed territories as are required by public convenience and necessity, taking into consideration among such other matters as it may deem appropriate questions of the public interest, health and welfare, and shall issue certificates accordingly. In making such determination the commission shall state its reasons therefor and make finding of the subsidiary facts on which the determination is predicated.

367.07 **Contents of certificates; maps.** — Every certificate of public convenience and necessity issued under this law shall describe the territory which the recipient is authorized to serve, shall confer on the recipient the exclusive right to serve such territory, and shall contain such other provisions as the commission may deem appropriate in harmony with the provisions of this law. The commission in its discretion may adopt and prescribe rules and regulations relating to the filing of a map or maps and/or metes and bounds descriptions delineating the territory which each recipient of a certificate is authorized to serve.

367.08 **Extensions of systems.** —

(1) PERMISSIBLE EXTENSIONS. — Every public utility engaged on June 18, 1959, in the construction or operation of a water or sewer system, and every recipient of a certificate of public convenience and necessity issued under the provisions of this law may extend its facilities

to any territory in which at the time of the extension any of its facilities are constructed or operated, and also may extend its facilities in the ordinary course of business within or to any territory which

(a) Is not receiving similar service from any public utility or municipality,

(b) Is not defined in any outstanding certificate, and

(c) Is contiguous to territory served by the extending public utility or to territory defined in its certificate; provided however that no extension shall be permitted in any area within a municipality of one hundred thousand or more population according to the last official census unless such municipality first grants a franchise for such extension.

(2) ANNUAL AMENDMENT OF CERTIFICATES. — Every recipient of a certificate of public convenience and necessity issued under the provisions of this law shall file with the commission on or before March 1 in every year, in compliance with such rules and regulations and in such form as the commission may adopt and prescribe from time to time, a description of all additional territory served by extensions of its facilities in the immediately preceding period of January 1 to December 31, inclusive, and the commission shall issue to it an amended certificate describing all territory which it had theretofore been authorized to serve together with the additional territory served by such extensions.

(3) PROHIBITED EXTENSIONS. — No public

utility excluding utilities owned or operated by municipalities shall extend the facilities of its water system or sewer system or either, except as authorized in subsection (1), without first obtaining for such extension a certificate of public convenience and necessity in accordance with the provisions of §367.05.

(4) INTERFERENCE WITH ANOTHER SYSTEM. — If any public utility in extending its water system or sewer system interferes unreasonably or is about to interfere unreasonably or competes or is about to compete with or duplicates or is about to duplicate, in whole or in part, the service or facilities of any other water system or sewer system, the commission, upon complaint, and after public notice and hearing, may with respect to such interference, competition and duplication or any thereof make such order and prescribe such terms and conditions in harmony with this law as are required by public convenience and necessity, and in so doing shall state its reasons therefor and make findings of the subsidiary facts on which its determination of public convenience and necessity is predicated.

367.09 **Stop orders.** — Whenever any public utility engages or is about to engage in the construction, operation or extension of a water system or sewer system in violation of this law the commission on its own initiative or upon complaint shall forthwith make such preliminary investigation as it may deem appropriate and may, either with or without notice, enter an order requiring such public utilities to cease and desist from such construction, operation or extension until further order of the commission. A public hearing on such violation shall be held by the commission within thirty days after the entry of the

order to cease and desist. Reasonable written notice of the public hearing shall be given by mail to the chief executive officer of every county and municipality affected, to the Florida state board of health, and to every party of record. Notice of such public hearing also shall be published in a newspaper of general circulation in the territory affected. For this purpose one publication of the notice in each newspaper not less than five nor more than ten days before the public hearing shall suffice. Within fifteen days after the hearing the commission shall enter an order taking such action in harmony with the provisions of this law and prescribing such terms and conditions with respect thereto as are just and reasonable and will best further public convenience and necessity, taking into consideration among such other matters as the commission may deem appropriate the public interest, health and welfare. In so doing the commission shall state its reasons for the action taken and make findings of the subsidiary facts on which such action is predicated. For good cause shown the time limits fixed in this section may be enlarged by the commission in any case.

367.10 **Transfer of certificates.** — If any recipient of a certificate issued under this law shall sell or otherwise transfer all of the physical property comprising its water system or sewer system, it also shall assign its certificate to the purchaser or transferee. Within ten days after such sale or transfer the purchaser or transferee shall surrender the assigned certificate to the commission, which thereupon shall issue to the purchaser or transferee a certificate of public convenience and necessity authorizing the purchaser or transferee to serve the territory described in the surrendered certificate. If the recipient of a certificate issued under this law shall sell or other-

wise transfer less than all of the physical property comprising its water system or sewer system it shall, within ten days after such sale or other transfer, surrender its certificate to the commission and file therewith descriptions of

(a) The territory served by the physical property not sold or otherwise transferred, and

(b) The territory served by the physical property sold or otherwise transferred. The commission shall thereupon issue

1. To the seller or transferor a new certificate authorizing it to continue serving the territory served by the physical property not sold or otherwise transferred, and

2. To the purchaser or transferee a new certificate authorizing it to serve the territory served by the physical property sold or transferred, provided, however, nothing in this section shall apply to utilities owned or operated by governmental agencies or utilities acquired by any governmental agencies.

367.11 **Duty to serve.** — Reasonably sufficient, adequate and efficient service shall be furnished by every public utility engaged June 18, 1959, in the construction or operation of a water system or sewer system to every person applying for service within the territory served by such system, and by every recipient of a certificate issued under this law to every person applying for service within the territory described in such certificate; provided, however, that if the furnishing of service by a public utility or recipient of a certificate in compliance with any appli-

cation for service would require the extension of an addition to its existing facilities, the public utility or recipient of a certificate, as a condition precedent to furnishing service, may require of the applicant reasonable sums for service availability or reasonable deposits guaranteeing compensatory revenues from the territory to be served or reasonable contributions in aid of construction to help defray the cost of facilities which will be used and useful in furnishing service, or any combination thereof or reasonable construction or other advances evidenced by refundable or nonrefundable agreements.

Notwithstanding any provisions of this law to the contrary, the provisions of subsections (1) - (5) shall be controlling.

(1) PROVISIONS. — Every public utility or holder of a certificate shall, at its cost, install all necessary plant expansions and extensions, water main extensions, sewage main extensions, force mains, lift stations and other facilities necessary to service a subdivision or area within the territory described in or covered by its certificate when the provisions of subsection (2) have been complied with or occur.

(2) PROVISIONS. — Owners of all or substantially all of the lots in a subdivision or an area which does not have sufficient, adequate and reasonable service of a water or sewer system who have installed or given reasonable assurances, to the public utility or certificate holder, holding a certificate covering said subdivision or area, that they will install within said subdivisions or area sufficient, adequate and reasonable water or sewer distribution or collection systems to service said subdivision or area to

make the same a part of the water system or the sewer system of the public utility or certificate holder and who shall convey or assign or give reasonable assurances that they will convey or assign at no cost their said collection system or distribution systems to the public utility or holder of a certificate to service said territory may require the public utility or certificate holder to promptly comply with the provisions of subsection (1).

(3) PROVISIONS. — Upon the failure of a public utility or certificate holder to comply with the provisions of subsection (1) after the compliance with the provisions of subsection (2) by persons as described in subsection (2), the commission shall forthwith enter its order revoking the certificate of the certificate holder or public utility as to the subdivision or area which it has failed to serve in the manner set out in subsection (1).

(4) PROVISIONS. — Upon the occurrence of a revocation pursuant to the provisions of subsection (3), the owners or persons who have caused to be installed or given assurances of installation of a water or sewer system in a subdivision or area pursuant to the provisions of subsection (2) shall, upon application for a certificate for said subdivision or area and compliance with other provisions of this law, be granted a certificate of public convenience and necessity to serve a territory consisting of the subdivision or area where said owner's water or sewer system shall have been installed or assurance for installation have been made.

(5) PROVISIONS. — If any owner of all or substantially all of a subdivision or area shall hereafter install within said subdivision or area a water or sewer

system or collection or distribution facilities and shall further convey or assign the same to a public utility or holder of a certificate, no cost, and if the same provides benefits for the public utility or certificate holder from areas other than the specific subdivision or area where the same is installed, then it shall, upon appropriate application, be the duty of the commission to ascertain and determine the value and extent of said benefits to pro rate the same and require reimbursement of the reasonable pro rata part or portion of the cost of installation of said conveyed or assigned water distribution or sewer collection facilities, and thereupon the public utility or certificate holder shall accordingly, as ordered, reimburse said cost.

367.12 **Initial rates and rules. —**

(1) INITIAL RATES. — All rates and charges of every public utility in effect on June 18, 1959, shall be the lawful rates and charges of the public utility. The rates and charges authorized by the commission prior to or at the time of issuing to a public utility a certificate under §367.05 shall be the lawful rates and charges of such public utility. All such rates and charges of such public utility. All such rates and charges shall continue in effect as lawful rates and charges unless and until changed by the commission as provided in this law; except in municipalities of one hundred thousand or more as of the last official census where rates are otherwise fixed pursuant to special acts.

(2) FILING REQUIRED. — Within six months after June 18, 1959, every public utility excluding utilities owned or operated by governmental agencies engaged on

June 18, 1959, in the construction or operation of a water system or sewer system shall file with the commission schedules showing all of its rates, classifications and charges for service of every kind furnished by it on June 18, 1959, and a complete copy of all of its rules and regulations relating thereto in effect on June 18, 1959. Prior to or at the time of the issuance to a public utility of a certificate under §367.05, such public utility shall file with the commission schedules showing all of its rates, classifications and charges for service of every kind to be furnished by it and all of its rules and regulations relating thereto and a report by an engineer registered in the state, establishing the fair value of the public utilities property used and useful in the public service, as of June 18, 1959.

(3) CURRENT SCHEDULES. — After making the initial filings required by subsection (1), every public utility excluding utilities owned or operated by governmental agencies shall at all times maintain on file with the commission, in such form and under such rules and regulations as the commission may adopt and prescribe, schedules showing all of its current rates, classifications and charges for service of every kind furnished by it and a complete copy of all of its current rules and regulations relating thereto; provided, however that no such form, rule or regulation shall be adopted or prescribed by the commission until after the holding by the commission of a public hearing on the proposed form, rule or regulation.

(4) EXCLUSION. — The provisions of subsections (1), (2), and (3) relate and shall apply only to rates and charges for service after the installation and connection of the facilities of a public utility and shall not apply to

nor affect any contract or agreement heretofore or hereafter made providing in connection with an application for service for the payment of reasonable sums of money for service availability or reasonable deposits guaranteeing compensatory revenues from the territory to be served or reasonable contributions in aid of construction to help defray the cost of facilities which will be used and useful in furnishing service or any combination thereof or reasonable construction or other advances evidenced by refundable or non-refundable agreements.

367.13 **Effective rates. —**

(1) PRESENT SERVICE. — After the rates and charges provided for in subsections (1), (2) and (3) of §367.12 become effective no public utility excluding utilities owned or operated by governmental agencies shall charge or receive, directly or indirectly, any other rate or charge for any class of service provided for in the filings required by §367.12, unless and until such rates and charges shall be changed by the commission in accordance with the provisions of this law.

(2) NEW SERVICE. — If any application for the service of a public utility shall be for a new class of service not provided for in the filings required by §367.12, the public utility may furnish the new class of service applied for and fix just, fair, reasonable and compensatory rates and charges therefor. A schedule of any rates and charges so fixed shall be filed with the commission within ten days after the new class of service is furnished. The commission, after public hearing, may approve, increase or reduce such rates and charges as may be just, fair, reasonable and compensatory.

367.14 Changes in rates. —

(1) COMMISSION JURISDICTION. — Whenever upon its own motion or upon complaint, and after public hearing, the commission finds that the existing rates of any public utility holding a certificate under the provisions of this law are unreasonable, insufficient, noncompensatory, unreasonably discriminatory or in any way in violation of the provisions of this law or any order, rule or regulation prescribed under this law, the commission shall determine just, reasonable, sufficient and compensatory rates to be thereafter observed and in force, and shall fix them by order.

(2) PROPOSED CHANGES. — Any public utility holding a certificate under the provisions of this law desiring to change any rate or charge or any rule or regulation relating thereto shall file with the commission a written notice showing the change or changes proposed and the date when the change or changes are to become effective, which date shall not be less than thirty days after the filing of the notice, and shall file with the notice a written explanation of the reasons for and the reasonableness of the proposed change or changes. The public utility also shall give such public notice of the proposed change or changes as the commission in its discretion may direct.

(3) PUBLIC NOTICE. — For good cause shown and under such conditions as it may prescribe, the commission may allow changes in rates or charges or rules or regulations relating thereto without requiring the giving of prior public notice thereof, except that when general increases in a schedule of rates and charges are proposed they shall not become effective until after public notice

thereof shall have been given by publication once a week for two consecutive weeks in a newspaper of general circulation in the territory affected.

(4) SUSPENSION OF PROPOSED RATES. — Whenever there is filed with the commission by any public utility holding a certificate under the provisions of this law any notice of general increases in a schedule of rates and charges, the commission may, either upon complaint or of its own initiative, and after such public notice as it may prescribe, enter upon a hearing to determine whether the proposed rates are just, reasonable, sufficient and compensatory. Pending such hearing and the decision of the commission thereon, the commission, upon filing with the proposed rates and charges and delivering to the public utility a statement of its reasons therefor, may suspend the operation of the proposed rates and charges at any time before they become effective, but not for a longer period than forty-five days beyond the time when the proposed rates and charges would otherwise have become effective, unless during the forty-five day period of suspension the commission shall find, and shall file with the proposed rates and charges and deliver to the public utility a statement of its reasons for so finding, that a longer time will be required, in which event the commission may extend the period of suspension not to exceed an additional forty-five days.

(5) MAKING SUSPENDED RATES EFFECTIVE. — Notwithstanding any such order of suspension the public utility holding a certificate under the provisions of this law may put the suspended rates into effect on or after the day on which they would have become effective if not suspended, by filing with the commission a bond in

a reasonable amount fixed and approved by the commission, with a surety or sureties approved by the commission, conditioned upon the refunding, in a manner to be prescribed by order of the commission, to persons respectively entitled thereto, of the amount of excess if the rates so put into effect are lawfully determined to be excessive, or there may be substituted in lieu of such bond an arrangement for the depositing of funds with a trustee approved by the commission or other arrangements satisfactory to the commission for the protection of the parties affected. During any such period of suspension the public utility shall maintain records of all amounts by which payments made by its customers under the rates so put into effect exceed the payments which such customers would have made under the rates theretofore in effect.

(6) COMMISSION ACTION. — If after public hearing the commission determines the proposed rates and charges to be unreasonable, insufficient, noncompensatory, or unjustly discriminatory, or in any way in violation of this law or of any order, rule or regulation prescribed under this law, the commission shall determine the just, reasonable, sufficient and compensatory rates and charges to be charged by the public utility and shall fix such rates and charges and the date when they shall become effective, by order to be served upon the public utility. Any rates and charges so fixed shall be observed from their effective date until changed as provided in this law. Any such determination shall embody a statement by the commission of its reasons therefor, a specification and enumeration of all matters and every matter considered by the commission in making the determination, and findings by the commission of the subsidiary facts on which the determination is predicated.

(7) MATTERS TO BE CONSIDERED. — In determining just, reasonable, sufficient and compensatory rates the commission shall give due consideration to the public utility's property used and useful in the public service, the public utility's requirements for cash working capital and for materials and supplies, the revenues received for the service of the public utility, the reasonable operating expenses and other costs of the public utility necessary to provide the service, depreciation expense reflecting rates of depreciation intended and reasonably designed and applied to enable the public utility to recover the cost of its several classes of depreciable property over the estimated periods of their respective service lives, all taxes of every description levied or imposed on the public utility and its property, revenues, income and expenses, the previously incurred and estimated future reasonable costs and expenses of the public utility in and in connection with the proceeding under consideration, the total earnings required by the public utility for the proper discharge of its duty to the public, and such other matters, circumstances and conditions as the commission may find necessary or advisable to enable it to determine and prescribe rates and charges which will provide to the public utility a fair return on the fair value of the property of the public utility used and useful in the public service as evidenced by the engineering report required by §367.12 (2) and in all rate proceedings thereafter a fair return on the initial fair value of the property of the public utility used and useful in the public service together with the original cost of all net additions to such property thereafter.

(8) HEARING. — Every hearing involving the rates and charges of any public utility shall be held before

a majority of the full commission, or an examiner appointed by the commission.

(9) RECORD. — A full and complete record shall be kept of all rate proceedings had before the commission, and all testimony in every hearing shall be taken down by a reporter appointed by the commission.

(10) SERVICE AND NOTICE OF ORDER. — After the conclusion of a hearing the commission shall make and file its order. A certified copy of such order shall be served by certified mail upon the public utility affected thereby and its attorney, if any, and notice thereof shall be given personally or by mail to every other party to the proceeding and his attorney, if any.

(11) EFFECTIVE DATE OF ORDER. — The order shall take effect and become operative thirty days after the service thereof unless a later effective date be provided therein, and shall continue in force either for a period which may be designated therein or until changed or revoked by the commission. If an order cannot, in the judgment of the commission, be complied with within thirty days, the commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply therewith, and may, on application and for good cause shown, grant extensions of the time for compliance.

(12) REHEARING. — After an order has been made by the commission, any party to the proceeding may, pursuant to the commission rules, practices and procedures apply for a rehearing respecting any matter determined in the order, and the commission may, if it appears to be proper, grant and hold such rehearing. If the application

be granted, the commission's order shall be deemed vacated and the commission shall enter a new order after the rehearing has been concluded.

(13) EXCLUSION. — The provisions of this section relate and apply only to rates and charges for service after the installation and connection of the facilities of a public utility and shall not apply to nor affect any contract or agreement heretofore or hereafter made providing in connection with an application for service for the payment of reasonable sums of money for service availability or reasonable deposits guaranteeing compensatory revenues from the territory to be served or reasonable contributions in aid of construction to help defray the cost of facilities which will be used and useful in furnishing service, or any combination thereof or any refundable or nonrefundable agreements heretofore or hereafter made evidencing construction or other advances.

367.15 Powers of commission. —

(1) SERVICE REGULATIONS. — The commission shall have the power to prescribe fair and reasonable classifications, standards of quality and measurement, and service rules and regulations to be observed by every public utility excluding utilities owned or operated by municipalities. No such classification, standard, rule or regulation shall be prescribed until after the holding by the commission of a public hearing on the proposed classification, standard or rule or regulation.

(2) UNIFORM ACCOUNTING SYSTEMS. — The commission may prescribe uniform systems and classifications of accounts to be kept by public utilities holding a

certificate under the provisions of this law, and may prescribe the manner in which the accounts shall be kept, and may require said public utility to keep its books, papers and records accurately and faithfully according to any system of accounts so prescribed. No such action shall be taken by the commission until after the holding by the commission of a public hearing on any proposed uniform system and classifications.

(3) DEPRECIATION. — Every public utility shall have the right and may be required by the commission to charge annually as an operating expense a just, fair and reasonable sum for depreciation and to credit the sum so charged to a depreciation reserve, which depreciation reserve shall be charged with retirements of depreciable property from service.

(4) VALUATION. — The commission may, after public notice and public hearing, ascertain and fix the fair value of the whole or any part of the property of any public utility holding a certificate under the provisions of this law insofar as may be necessary to the exercise by the commission of its jurisdiction under this law.

(5) ANNUAL REPORTS. — The commission may, by rule or regulation applying uniformly to all public utilities of any class excluding utilities owned or operated by governmental agencies, require such public utilities to file annual reports of such uniform content and in such uniform form as the commission may prescribe and furnish for that purpose. No such action shall be taken by the commission until after the holding by the commission of a public hearing on the proposed form of annual report.

(6) SPECIAL REPORTS. — The commission also may require of any public utility holding a certificate under the provisions of this law a special report respecting any matter regarding which the commission is authorized to inquire, or to keep itself informed, or to enforce, in carrying out the provisions of this law.

(7) STAFF. — The commission may employ and fix the compensation of such examiners and technical, legal and clerical employees as may be necessary to carry out the provisions of this law.

(8) RULES AND REGULATIONS. — The commission may prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this law. No such action shall be taken by the commission until after the holding by the commission of a public hearing on the proposed rule or regulation.

(9) ACCESS TO PREMISES. — The commission or its duly authorized representatives may during all reasonable hours enter upon any premises occupied by any public utility holding a certificate under the provisions of this law and may set up and use thereon all necessary apparatus and appliances for the purpose of making investigations, inspections, examinations and tests and of exercising any power conferred by this law; provided, however, that such public utility shall have the right to be notified of and be represented at the making of such investigations, inspections, examinations and tests.

367.16 Rates of municipal systems. — The commission shall not have jurisdiction to regulate the rates or

charges of any system owned or operated by a governmental agency.

367.17 **Review of orders of commission.** — Any public utility holding a certificate under the provisions of this law, party or other person affected, dissatisfied with any order of the commission may have it reviewed by the supreme court of Florida on writ of certiorari only; provided, however, that no order of the commission shall be reviewed unless an application to the commission for a rehearing has been filed and refused.

367.18 **Unaffected powers.** — Nothing in this law shall be deemed to repeal or affect §167.22 and chapter 153, or chapter 9861, special acts 1923; chapter 10968, special acts 1925; chapter 31075, special acts 1955; chapter 31076, special acts 1955; chapter 30178, special acts 1955; chapter 31092, special acts 1955; chapter 31011, special acts 1955; chapter 21230, special acts 1941; chapter 23535, special acts 1945; chapter 26223, special acts 1949; chapter 27893, special acts 1951; chapter 6356, special acts 1911; chapter 24605, special acts 1947, as amended by chapter 25927, special acts 1949; chapter 30882, special acts 1955; chapter 23373, special acts 1945; chapter 26443, extra session 1949; chapter 27650, special acts 1951; chapter 27649, special acts 1951; chapter 27659, special acts 1951; chapter 29201, special acts 1953. No provision of this law shall in any way affect any municipal tax or franchise tax in any manner whatsoever, nor to limit, abridge or affect the authority, rights or privileges, now existing or hereafter conferred thereon by law, or any governmental agency to supply water or sewerage service to any area in this state.

367.19 **Gross receipts tax.** — Every public utility holding a certificate under the provisions of this law shall on or before March 15 in every year report to the comptroller of the state, under oath of its secretary or one of its other officers, the total amount of the gross receipts derived by it in the immediately preceding period of January 1 to December 31, inclusive, from business done within this state, and at the time of so reporting shall pay to the treasurer of the state a gross receipts tax in the amount of one dollar fifty cents for each one hundred dollars or fraction thereof of such gross receipts, provided, however, that whenever a purchase is made of any water and a tax is paid thereon by a public utility and such public utility resells the same directly to consumers such public utility shall be entitled and shall receive credit upon such taxes as may be due by it under this section to the extent of the tax paid or payable upon such water by the person, firm or corporation from whom such purchase was made. If any public utility fails to make such report and pay such tax, the comptroller, after giving at least five days written notice to the public utility, shall estimate the amount of such gross receipts from such information as he may be able to obtain from any source and shall add ten per cent of the amount of such tax as a penalty and shall proceed to collect such tax and penalty, together with all costs of collection thereof, in the same manner as other delinquent taxes are collected, provided, however, that no penalty shall be added to the tax in the event a return is made and the amount of the tax is paid before the expiration of the time fixed in the notice given by the comptroller. All such tax payments and penalties shall be placed in the general revenue fund. The comptroller may audit such reports and upon demand every public utility shall submit all of its records, papers, books

and accounts to the comptroller or his representatives for audit.

367.20 **Violations.** — All provisions of §350.36, as now in effect or hereafter amended shall apply in every respect to any violation of any provision of this law.

367.21 **Exclusive jurisdiction.** — The jurisdiction conferred upon the commission by this law shall be exclusive, except where municipal jurisdiction is exercised in municipalities of one hundred thousand or more population according to the last official census pursuant to existing franchises or special acts.

367.22 **Legislative declaration.** — The regulation of public utilities as defined herein is declared to be in the public interest, and this law shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions of this law shall be liberally construed for the accomplishment of that purpose; provided however that no existing franchise or contract rights of municipalities having one hundred thousand or more population according to the last official census shall be impaired thereby.

367.23 **Effectiveness dependent on resolution by board of county commissioners.** — The provisions of this law shall become effective in a county of this state immediately upon the adoption by the board of county commissioners of such county of a resolution declaring that such county is subject to the provisions of this law and the submission of said resolution to the railroad and public utilities commission.

FILED
JUN 8 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Case No. 72

CITY OF PLANTATION, a municipal corporation of Broward County, Florida, *Appellant*,

v.

UTILITIES OPERATING CO., INC., a Florida corporation, *Appellee*.

APPELLEE'S MOTION TO DISMISS AND BRIEF IN SUPPORT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

Case No. 1096

CITY OF PLANTATION, a municipal corporation of Broward County, Florida, *Appellant*,

v.

UTILITIES OPERATING CO., INC., a Florida corporation, *Appellee*.

APPELLEE'S MOTION TO DISMISS

Comes now the Appellee pursuant to Rule 16 of the Revised Rules of this Court and moves to dismiss this appeal from the decision of the highest court of the State of Florida on the ground that it presents only a question of local law and, therefore, does not present a substantial federal question, showing the following:

1. The appellant commenced this action by seeking a declaratory judgment in the courts of Florida that the Water and Sewer System Regulatory Law of Flor-

ida, Chapter 367, 1959 Florida Statutes, is in contravention of the contract clause of the United States Constitution, Article 1, Section 10. The trial court and the Supreme Court of Florida denied the relief requested, ruling that the challenged statute was not unconstitutional as contended by appellant.

2. In 1953 when appellant was chartered as a municipality in Florida it had authority to regulate the rates charged consumers by water and sewer systems. In accordance with this authority it adopted a franchise ordinance authorizing appellee to construct, maintain and operate water and sewerage systems in the municipality for a period of 30 years. The ordinance established maximum initial rates for appellee and reserved the right to regulate future rates.

3. In 1959 the Florida Legislature enacted the Water and Sewer System Regulatory Law which transferred rate regulatory control of water and sewer systems from municipalities to the state Railroad and Public Utilities Commission. Since 1885, Article XVI, Section 30 of the Constitution of Florida has empowered the state legislature to regulate rates and services of public utilities. The appellant nevertheless argues that the 1959 law impaired the obligations of the franchise contract it had with appellee as a result of the franchise ordinance previously adopted.

4. This case involves simply an intramural transfer of authority to regulate the rates charged by appellee in its water and sewer services—a transfer from the appellant municipality to the state Railroad and Public Utilities Commission. The municipality is merely an arm of the state which is fully subject to the will of its sovereign and it cannot complain of this transfer

of regulatory powers. The contract clause of Article I, Section 10 does not apply to the relationships between the municipality and the state. Moreover, the state had the reserve power to make this transfer of regulatory powers and thereby alter the franchise contract appellant had with appellee, at any time it chose to do so. The appellant could not make a contract with appellee which would have the effect of foreclosing the reserved power of the state to provide for the regulation of rates of water and sewer systems. These matters raised no issues under the United States Constitution; they are merely issues of local law and the highest court of the state has disposed of them adversely to appellant. *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U.S. 394, 397 (1919). Accordingly, no substantial federal question has been presented by appellant.

WHEREFORE, appellee Utilities Operating Company, Inc. respectfully prays that the appeal be dismissed and that such other and further relief be granted as may to the Court seem proper.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

Case No. 1096

CITY OF PLANTATION, a municipal corporation of Broward County, Florida, *Appellant*,

v.

UTILITIES OPERATING CO., INC., a Florida corporation, *Appellee*.

BRIEF IN SUPPORT OF APPELLEE'S MOTION TO DISMISS

Nature of Proceedings

This is an appeal from a decision of the highest court of the State of Florida in which, the appellant contends, there is drawn in question the validity of a statute of the state on the ground of its being repugnant to the Constitution of the United States (See

28 U.S.C. § 1257(2)). The statute under challenge is the Water and Sewer System Regulatory Law of Florida, set forth as Chapter 367 of the 1959 Florida Statutes, and it allegedly is contrary to the contract clause of Article I, Section 10 of the United States Constitution by effectively transferring from the appellant municipality to the Florida Railroad and Public Utilities Commission regulatory control of water systems, including the system operated by appellee.

The Florida trial court and the Supreme Court of Florida held the statute does not contravene Article I, Section 10 of the Constitution. The municipality filed notice of appeal to this Court and, on May 9, 1964, the jurisdictional statement of appellant was filed herein.

Statement of Case

In 1954 the governing body of the appellant, a municipal corporation in Florida, adopted a franchise ordinance authorizing appellee to construct, maintain and operate water and sewerage systems in the municipality for a period of 30 years. The ordinance established maximum initial rates for appellee's service to the public and reserved to the municipality the right to regulate future rates.

The charter granted appellant by the Florida Legislature in 1953 empowered it to regulate water and sewer rates. The general laws of the state further authorized the city to "prescribe by ordinance maximum rates and charges for the supply of water * * * to such city * * * and the inhabitants, such charges to be just and reasonable."[1]

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[1] § 167.57, Florida Statutes.

Since 1885 the Constitution of Florida has provided in Article XVI, Section 30, that:

> "The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures."

Pursuant to this provision of the Constitution the Florida Legislature enacted the Water and Sewer System Regulatory Law in 1959. This law, the text of which is reproduced in appellant's jurisdictional statement,[2] vested in the Florida Railroad and Public Utilities Commission regulatory control of the rates and services of water companies.

The Supreme Court of Florida held, in the appellant's appeal from the judgment of the trial court, that the 1959 law superseded the prior laws empowering appellant to regulate water companies and had the effect of altering the franchise agreement between appellant and appellee.[3] The Court said:

> "Article XVI, Section 30, Florida Constitution, vests in the Legislature full power to regulate charges and services performed by public utilities. Until the Legislature undertakes to assert this power, a franchise arrangement, such as the one before us, may properly provide for rate regulation by a municipality. Such an agreement, however, is presumed to have been made with full knowledge of the inherent reserved power of the

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[2] Jurisdictional Statement, Appendix p. 7, et seq.

[3] Loc. cit., Appendix pp. 4-6.

> State to alter the contract regarding rates at such time as the Legislature deems it appropriate to assert the power under the Constitution. It also follows that when the parties enter into such a contract they do so with the full realization that the contractual provisions are ineffective to preclude subsequent legislative action in the exercise of the State's police power.'"[4]

It is the contention of the Appellant that the exercise of this power by the State of Florida was an impairment of the obligations of the franchise agreement it had with the water company (appellee). It is further argued that this impairment is prohibited by Article I, Section 10 of the United States Constitution.

No Federal Question Is Presented By This Appeal

The only question on this appeal is whether the contract clause of the United States Constitution is applicable to the relationships between the State and its subdivision, a municipality in the absence of any state law or other arrangement making the clause applicable. This is not a case in which the utility or the municipality is attempting to enforce a franchise agreement as between the parties where there has been no state action pursuant to reserved powers of the state interfering with the municipality's rights under the agreement. See, *Home Telephone and Telegraph Co.* v. *Los Angeles,* 211 U.S. 265 (1908); *Detroit United Railway* v. *Michigan,* 242 U.S. 238 (1916). Here the city would usurp or take over the constitutionally reserved power of its sovereign, the State of Florida, to regulate water and sewer rates by interposing a franchise agreement of its own making.

[4] Loc. Cit., Appendix p. 6.

The municipality is simply an arm of the State and its rights and powers may be altered at the will of the State. *Trenton* v. *New Jersey*, 262 U.S. 182 (1923); *Newark* v. *New Jersey*, 262 U.S. 192 (1923); *Williams* v. *Baltimore*, 289 U.S. 36 (1933). In the *Trenton* case, fee charges by the state against a municipality for diverting water from the Delaware River were upheld against constitutional objections based upon the rights of the private water company which had been taken over by the city. Differentiating the constitutional protection afforded a private water company from the rights of a municipality against its sovereign, this Court said:

> "The relations existing between the state and the water company were not the same as those between the state and the city. The company was organized and carried on its business for pecuniary profit. Its rights and property were privately owned and therefore safeguarded by the constitutional provisions here sought to be invoked by the city against the legislation of the state. * * *
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> * * *
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> "In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, *grant or withdraw powers and privileges, as it sees fit.* However great or small its sphere of action, it remains the creature of the state, exercising and holding powers and privileges *subject to the sovereign will.*" 262 U.S. at 185-187. (Emphasis added).

It is this principle which appellant ignores in this case. It relies upon a number of cases holding that a state may authorize a municipality to enter into fran-

chise contracts which are enforceable against attempts of either the municipality or the franchised operator to change the service rates specified in the contracts.[5] In none of these cases did the state step in and withdraw the municipalities' power to enforce the contracts as the State of Florida did in this instance.

Whenever the state has, pursuant to authority of its constitution, intervened to transfer the power of a municipality to regulate public utility rates to a state commission, this Court has upheld the intramural transfer as against the objection of the municipality that it impaired the obligations of contracts entered into before the transfer of powers became effective. *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919). Indeed, even the private company operating the public utility pursuant to a franchise contract may not raise the constitutional objection where the state has altered municipal powers in accordance with the state constitution. *Puget Sound Traction, L. & P. Co.* v. *Reynolds*, 244 U.S. 574 (1917).

In the last cited case the street railway operator, relying upon a franchise agreement with the municipality, objected to regulation by the state Public Service Commission under a law enacted by the state after the grant of the franchise by the municipality. Holding there was no impairment of contract obligations within the meaning of Article I, Section 10 of the United States Constitution, this Court said:

> "Assuming (what is not clear) that the provision in the franchise ordinances respecting the rates

[5] *St. Cloud Public Service Co.* v. *St. Cloud*, 265 U.S. 352 (1924); *Detroit United Railway* v. *Michigan*, 242 U.S. 238 (1916); *Georgia Ry. & Power Co.* v. *Decatur*, 262 U.S. 432 (1923), and others cited on page 8 of the Jurisdictional Statement.

> of fare and the transfer privileges are contractual in form, still it is well settled that a municipality cannot by a contract of this nature, foreclose the exercise of the police power of the state unless clearly authorized to do so by the supreme legislative power. The Constitution of Washington, Art. 12, § 18, requires the legislature to pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight." 244 U.S. at 578-79.

In the *Pawhuska* case, supra, the municipality challenged an order of the state Corporation Commission fixing natural gas rates with the contention that a contract it entered into with the gas company in 1909 was unconstitutionally impaired by a 1913 state law giving the state Corporation Commission power over the rates of public utilities. This Court dismissed the writ of error on the ground that no constitutional issue was raised, saying:

> "It is not contended—nor could it well be—that any private right of the city was infringed, but only that a power to regulate in the public interest, theretofore confided to it, was taken away and lodged in another agency of the state—one created by the state constitution. Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly was granted. In this no question under the contract clause of the constitution of the United States is involved, but *only a question of local law, the decision of which by the supreme court of the state is final.*" 250 U.S. at 397 (Emphasis added).

Emphasizing the power of the state to control the municipality the Court thereafter quoted from *New*

Orleans v. *New Orleans Waterworks Co.*, 142 U.S. 79, 91 (1891) as follows:

> "* * * 'The municipality, being a mere agent of the state, stands in its governmental or public character in no contract relation with its sovereign, * * *. In this case the city has no more right to claim an immunity for its contract with the waterworks company than it would have had if such contract had been made directly with the state. The state, having authorised such contract, might revoke or modify it at its pleasure." 250 U.S. at 399.

In this case the contract between appellant and appellee for a water and sewer service was subject to change by the State of Florida. It was changed by transferring regulatory and rate control powers from the municipality—a mere arm of the state—to the Railroad and Public Utilities Commission. The city may not, under these circumstances, raise any question of impairment of contract under Article I, Section 10 of the United States Constitution. Accordingly, there is no recognizable federal question involved in this appeal.

Conclusion

The Constitution of the State of Florida reserved to the state the power to regulate rates of public utilities. Although at one time the state carried out this power through appellant as a municipality, it made an intramural change by transferring authority from the municipality to the state Railroad and Public Utilities Commission. The municipality, as an arm of the state, is bound by this transfer of powers. Moreover, the franchise agreement it had with appellee was made

subject to the constitutional authority of the state to transfer rate powers away from the municipality. These are questions of local law and do not involve Article I, Section 10 of the Constitution of the United States. The appeal should be dismissed for failure to raise a substantial federal question.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1964

CASE No. 72

CITY OF PLANTATION, a municipal corporation of Broward County, Florida,

Appellant,

vs.

UTILITIES OPERATING CO., INC., a Florida corporation,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

The appellee has moved to dismiss the appeal upon the ground that no federal question is presented thereby. This brief is presented in opposition to appellee's contention.

REPLY TO APPELLEE'S STATEMENT OF CASE

The appellee's brief (page 7) points to Article XVI, Section 20 of the Florida Constitution, as the provision of state organic law which permitted that sovereign to

usurp the city's rate-making authority. However, by its own terms, that section provided for state correction of abuses and prevention of unjust discrimination and excessive charges *by a public utility company*. The Statute here challenged was not enacted at the behest of consumers who were being victimized by the public utility. Indeed, the transfer of rate-making authority to the public utilities commission has resulted only in steadily increasing rates. *Utilities Operating Co. v. King*, Fla. 1962, 143 So.2d 854; *Plantation v. Mason*, Fla.1964, —— So.2d——; *Village of North Palm Beach v. Mason*, Fla. 1964, ——So.2d——.

In summarizing appellant's argument, the appellee's brief (page 8) overlooks appellant's claim (Jurisdictional Statement, page 9) that, assuming the State's right to impair franchise agreements, the challenged Statute was an improper exercise of that power insofar as it arbitrarily and discriminatorily excluded cities of more than 100,000 from similar intervention.

REPLY TO APPELLEE'S ARGUMENT

The appellee urges that the "King can do no wrong", and therefore the State of Florida had absolute authority to do whatever it chose to the appellant/city, including of course, impairing the city's franchise agreement. In reaching this conclusion, the appellee relies upon some sweeping dicta from *Pawhuska v. Pawhuska Oil & Gas Co.*,[1] *Trenton v. State of New Jersey*,[2] and similar cases.

This Court had occasion to reconsider such "seem-

[1]Cited at page 10, appellee's brief.
[2]Id., page 9.

ingly unconfined" dicta in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), and held that the State *does not have uncontrolled power* "to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations", and that

> " * * * the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. * * * "

Indeed, even the Supreme Court of Florida did not rely upon a "plenary power" theory in the decision here challenged, but, rather, held that the State had the police power to usurp the appellant's rate-making authority (Jurisdictional Statement, App. 5-6). The only federal decision appearing in that Court's opinion is *Pudget Sound Traction, Light & Power Co. v. Reynolds*, 244 U.S. 574, 37 S.Ct. 705, 61 L.Ed. 1325 (1917). The *Pudget Sound* case is also cited in appellee's brief (page 10). Thus, both the Florida Supreme Court and the appellee have overlooked the fact that, in the last-cited case, unlike here, the municipal corporation *did not have* express legislative authority to enter into the rate-setting franchise. Id., at pp. 579, 707, 1330. That this appellant/city was expressly granted such authority is apparently conceded by the Florida Supreme Court's opinion (Jurisdictional Statement, App. 5-6) and the appellee's brief (page 6).

Similarly distinguishable is the *Pawhuska* case, supra, because there the State constitution expressly prohibited

the legislature from delegating any rate-making authority. 250 U.S. at 395, 39 S.Ct. at 527, 63 L.Ed. at 1056.

This Court has often invoked the contract clause for the benefit of a public utility company whose enfranchised rates or fares were later changed by state action.[1] See, e.g., *Detroit United Railway v. Michigan*, 242 U.S. 238, 37 S.Ct. 87, 61 L.Ed. 268 (1916); *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432, 43 S.Ct. 612, 67 L.Ed. 1065 (1923); *Los Angeles v. Los Angeles City Water Co.*, 177 U.S. 558, 575, 20 S.Ct. 736, 742, 44 L.Ed. 286, 894 (1900). Admittedly, appellant's counsel have been unable to find a case where this Court has invoked that salutary principle on behalf of the other parties to the franchise agreement, i.e., the city and its citizens/consumers. Nevertheless, it is self-evident that the public utility's vested right to a rate set by agreement should be no greater than the consuming public's.

Respectfully submitted,

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[1] In the opinion sought to be reviewed the Florida Supreme Court conceded that the franchise agreement was impaired by the challenged Statute. By an opinion filed just last month that Court has now decided that the franchise agreement was not only impaired, but that it ceased to exist. *State of Florida ex rel. Utilities Operating Co., Inc. v. Mason*, Fla.1964. ——So.2d.——.